No. 17314

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M&R Investment Company, Inc., d/b/a Dunes Hotel and Casino, and Fred Miller, Don Rich, Marvin Cole, Harry Riggs, Grimley Engineering, Inc., d/b/a Trans-Global Airlines, and Catalina Air Transport d/b/a Catalina Airlines,

Petitioners,

vs.

Civil Aeronautics Board,

Respondent.

On Petition for Review of an Order of the Civil Aeronautics Board of the United States of America.

BRIEF FOR PETITIONERS.

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M&R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO, and FRED MILLER, DON RICH, MARVIN COLE, HARRY RIGGS, GRIMLEY ENGINEERING, INC., d/b/a TRANS-GLOBAL AIRLINES, and CATALINA AIR TRANSPORT d/b/a CATALINA AIRLINES,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of an Order of the Civil Aeronautics Board of the United States of America.

BRIEF FOR PETITIONERS.

Jurisdictional Statement.

Petitioners have filed a Petition for Review of an order of Respondent, the Civil Aeronautics Board[1] issued at the conclusion of the administrative proceeding below.[2]

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[1]Opinion and Order No. E-16331, decided February 1, 1961 [Tr. 78-87]. The Board denied a Petition for Rehearing [Tr. 88-93] on March 22, 1961 and stayed temporarily the effectiveness of its prior order (Board Order No. E-16541, dated March 22, 1961 [Tr. 106-108].

[2]*Entitled M&R Investment Co., Inc. et al., Enforcement Proceeding,* Docket No. 10606. Petitioners M&R and Catalina and Trans-Global were respondent in the administrative proceeding. Petitioners Donald Rich and Fred Miller were not respondents in the administrative proceeding.

The Bureau of Enforcement,[3] the prosecuting section of the Board, filed a complaint against the respondents asserting that they were violating the Federal Aviation Act of 1958 (49 U. S. C. Sec. 1301 *et seq*) by engaging in "air transportation" in violation of 49 U. S. C. Section 1371(a).

This court is given jurisdiction to review this order by 49 U. S. C. Section 1486(a).

All of the petitioners reside or have their principal places of business within this Judicial Circuit. Venue is fixed by 49 U. S. C. Section 1486(b) which provides that the petition shall be filed in the Circuit where the petitioner resides or has his principal place of business. Venue is properly laid before this court.

Statutes Involved.

The principal statute involved is the Federal Aviation Act of 1958, 72 Stats. 737-806, 49 U. S. C. A. Section 1301-1542.

49 U. S. C. Section 1301 . . . Definitions.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other

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[3]Formerly called the Office of Compliance.

State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;
whether such commerce moves wholly by aircraft or party by aircraft and partly by other forms of transportation.

49 U. S. C. Section 1371 . . . Certificate of public convenience and necessity—Essentiality

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

49 U. S. C. Section 1486 . . . Judicial review—Orders subject to review; petition for review

(a) Any order, affirmative or negative, issued by the Board of Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of

Columbia upon petition, filed within sixty days after the entry of such order, by any persons disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Section 1486 . . . Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

The cited section of the Administrative Procedure Act (5 U. S. C. Sec. 1001, *et seq.*)

5 U. S. C. Section 1009 . . . Judicial review of agency action.

Except so far as (1) statutes preclude judicial review of (2) agency action is by law committed to agency discretion.

* * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3)

in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement of the Case.

The Bureau of Enforcement filed a complaint against the administrative respondents on June 15, 1959 [Tr. 2-6] alleging that the respondents were engaging in "air transportation" in violation of "Section 401 of the Federal Aviation Act of 1958" (49 U. S. C. Sec. 1371) by holding out and selling the "Dunes Tours" to the general public and providing air transportation between the Los Angeles, California area and Las Vegas, Nevada to the patrons of these tours [Tr. 2].

The persons named as respondents in the complaint consisted of the following:

1. Petitioner M&R Investment Co., Inc. d/b/a Dunes Hotel Las Vegas, Nevada. It was alleged that M&R operated as "an indirect air carrier" by holding out and selling the "Dunes Tours" to the general public, and providing air transportation to the tour patrons through aircraft leased from petitioners Trans-Global Airlines and Catalina Air Transport [Tr. 2].

2. Petitioner Catalina Air Transport d/b/a Catalina Airlines. It was alleged that Catalina engaged in air transportation by operating the flights between Las Vegas and Los Angeles carrying the tour patrons, in violation of Section 401(a) of the Act. (49 U. S. C. Sec. 1371(a)) [Tr. 3].

3. Fred Miller, Don Rich, Marvin Cole, Harry Riggs and Grimley Engineering Company d/b/a Golden State Airlines also d/b/a Trans-Global Airlines. It was alleged that these respondents were engaging in air transportation by operating the flights between Las Vegas and Los Angeles carrying the tour patrons in violation of Section 401(a) of the Act. During the course of the hearing, the petitioner Trans-Global Airlines, Inc., a corporation, was substituted as a respondent in the administrative proceeding for the above named individuals and companies [Tr. 163].

Petitioners, Fred Miller and Don Rich were removed as individual respondents in the administrative proceeding when Trans-Global Airlines, Inc., a corporation, was substituted for them. Nevertheless the Board held that petitioners, Rich and Miller, should be enjoined, along with the other respondents, because they were principals of petitioner, Trans-Global Airlines, Inc., and partners in the C-46 Company which owned two of the aircraft employed in operating the Dunes flights. The Board found that "operations may be resumed under some other name unless these persons are individually enjoined from engaging in air transportation" . . . [Tr. 52].[4]

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[4]The finding was taken from the Examiner's Initial Decision. The Board adopted as its own, the Examiner's findings and conclusions [Tr. 80].

The respondents filed answers denying the charges in the complaint and presenting affirmative defenses [Tr. 15-19, 109-113]. After public hearings were held and briefs had been submitted by the parties, the Hearing Examiner issued an Initial Decision holding that the respondents had violated the Act as charged, and enjoining the respondents and petitioners Rich and Miller from engaging in air transportation, in violation of 49 U. S. C. Section 1371(a). The Board adopted the Examiner's findings and conclusions as its own [Tr. 80]. The Board's injunction against engaging directly or indirectly in air transportation was directed against M& R Catalina, Trans-Global and Fred Miller and Donald Rich, individually, and as principals in Trans-Global Airlines, Inc. [Tr. 87]. This order is before this court for review.[5]

A brief description of the flight operations of the petitioners is as follows:

The Dunes Hotel is a resort hotel, located in Las Vegas, Nevada, approximately 289 road miles and 228 air miles from Los Angeles, California.[6] The Dunes' flights were offered in Los Angeles, California, free of charge, to guests of the Dunes Hotel who desired air transportation in connection with their stay at the Dunes Hotel in Las Vegas, Nevada. The evidence of record shows that all of the patrons of the Dunes flights were guests of the Dunes Hotel, and that they fell into the following categories:

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[5]The Board's order was stayed by this court on February 13, 1962 until the Board's order in *Las Vegas Hacienda Inc. v. C. A. B.*, No. 17081 shall become final and effective.

[6]The Board was requested to take official notice of these distances.

(a) Overnight guests who had confirmed, prepaid room reservations at the Dunes Hotel, Las Vegas, Nevada for the duration of their stay in Las Vegas [Tr. 233, 260]. Overnight guests were not required to purchase the Magic Carpet Tour or any part thereof, so long as their confirmed room reservations had been paid in full prior to boarding the flight [Tr. 235-236, 256-257].

(b) Evening tour guests who had purchased the Dunes tour. Since these persons did not remain overnight in Las Vegas, intensive screening process was employed by the Dunes and its agents to insure that no one was permitted to purchase an evening tour other than Dunes Hotel guests [Tr. 233-240, 255-261].

(c) Particular guests of the Dunes Hotel selected by the management who paid nothing for the tour or other hotel service and accommodations, and groups of guests attending conventions or parties at the Dunes Hotel. The record shows that these persons were guests of the Dunes Hotel in all instances [Tr. 212-213].

Patrons of the Dunes Tour received the following benefits:

1. Free air transportation from Burbank or Los Angeles to Las Vegas.

2. Champagne enroute from Los Angeles to Las Vegas.

3. Limousine service from the Las Vegas Airport to the Dunes Hotel.

4. One Sinbad Lounge cocktail.

5. Arabian Room show reservation and cocktail.

6. One bottle of Dunes Gold Label Champagne.

7. Limousine service from the Dunes Hotel to the Las Vegas Airport.

8. Free air transportation from Las Vegas to Burbank, or Los Angeles.

The Dunes Tour services were sold to guests of the Dunes Hotel for $29.95[7] [Tr. 232].

Each of the items listed above, other than the Dunes flights, were sold at the prevailing retail price for the article or service at the Dunes Hotel, or, in the case of the limousine service, at the rate charged the public by the Tanner Bus Line, the operator of the limousine [Tr. 365-366]. The total of these charges exceeded the price of $29.95.

A Tour booklet was received by each patron of the Tour [Tr. 367]. The booklet contains eight coupons, one for each of the services and benefits referred to above, with the exception of the champagne enroute.[8]

The Dunes had entered into contractual arrangements with both Trans-Global and Catalina Air Transport to perform the actual physical operation of the Dunes flights. With the exception of the Catalina employees who performed certain limited functions at the Los Angeles International Airport, the activities of Trans-Global and Catalina were limited to the physical performance of the Magic Carpet Flight [Tr. 9, 55-56, 194-197, 199-202].

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[7]The price was reduced to $19.95 on Sunday through Thursdays as a special inducement for guests of the Dunes Hotel to use the facilities of the hotel and to take the tour during the week when the facilities of the Dunes were not so crowded.

[8]No coupon was required to obtain the champagne enroute; liberal amounts of champagne were served the Tour guests [Tr. 172].

At the outset of the hearing, the petitioners moved to strike paragraphs 6 and 8 of the complaint, insofar as violations of the Federal Aviation Act of 1958 (49 U. S. C. Sec. 1301 *et seq.*) occurring prior to January 1, 1959 were alleged, on the ground that the sections of the Act that respondents were accused of violating, had not gone into effect until January 1, 1959 [Tr. 117-119]. This motion was denied by the Examiner, and voluminous evidence of pre-1959 violations were received in evidence over petitioners' continuous objection [Tr. 121-162]. This evidence was considered and relied on by the Board in reaching its findings, conclusions and decision [Tr. 31, 37].

The Board's final order in this case was in the form of an injunction against all petitioners, from engaging either directly or indirectly in air transportation, as that term was defined in 49 U. S. C. Section 1301-(10)(21), in violation of 49 U. S. C. Section 1371-(a). Petitioners' objected to the form of this order on the ground that it was too broad, and indefinite particularly as it applied to petitioners Trans-Global, Catalina, Rich and Miller who engaged in other aviation activities and flight operations.

Petitioners also objected to the inclusion of petitioners Rich and Miller in the injunction because they were not included as respondents in the administrative proceeding at the time the order was issued, and because there was no evidence of record to support the finding that there was "the likelihood that operations may be resumed under some other name unless these persons are individually enjoined. . . ." [Tr. 52].

Specification of Errors.

1. The Board erred in issuing the order on review without substantial evidence in the record to support it.

2. The Board erred in concluding that the petitioners were engaged in interstate air transportation as common carriers for compensation or hire.

3. The Board erred in admitting in evidence and relying upon evidence of petitioners activities prior to January 1, 1959.

4. The Board's injunction against petitioners to cease and desist from engaging in air transportation is too vague, indefinite and ambiguous.

5. The Board erred in including petitioners Rich and Miller within the scope of its injunction, because these petitioners were not respondents in the administrative proceeding, and there is no evidence to support the issuance of an injunction against them.

Summary of Argument.

The Dunes Tours did not constitute "air transportation" because the holding out and the privilege of taking the Dunes' Tour flights were restricted to hotel guests in Los Angeles, California. The Board improperly found that petitioners had violated Section 401-(a) of the Federal Aviation Act of 1958 on the basis of petitioners' activities which occurred prior to the effective date of this section. Absent this evidence, the Board's order is not supported by substantial evidence.

The inclusion of the individual petitioners in the Board's injunction was without legal or factual basis. The individuals were not respondents in the adminis-

trative proceeding, the corporate petitioners, Trans-Global Airlines Inc., was not their *alter ego,* and there is no evidentiary basis for the finding that the tour operations may be resumed if these petitioners are not enjoined, individually.

The Board's injunction, which is couched in the language of the statute, is too broad and indefinite. The Board's order should be limited to prohibition of the acts which the Board properly found violated the Act and those necessarily related thereto. The effect of the injunction on individuals and companies which engage in other aviation activities would be particularly onerous.

The Dunes Tour Flight Did Not Constitute Air Transportation.

Petitioners acknowledge that the tour flights involved in this proceeding resemble those in *Las Vegas Hacienda, Inc. v. C. A. B.,* 298 F. 2d 430 (C. A. 9, 1962).[9] Petitioners do not propose to belabor the legal issues raised and considered in that proceeding. Petitioners will point out the distinguishing factual features of the Dunes tours.

Persons requesting the Dunes tours were carefully screened by the Dunes' personnel to ensure that they were in fact guests of the Dunes Hotel, that they intended to stay at the Dunes Hotel. If they were overnight guests, or that they were planning to spend the evening at the Dunes Hotel if they were evening tour patrons [Tr. 233-240, 255-261].

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[9]This court held that the tour flights constituted "air transportation" and generally affirmed the Board's order. A petition for writ of certiorari is pending before the United States Supreme Court.

The newspaper advertising of the Dunes' tours featured the legend "For Guests of the Beautiful Dunes Hotel and Casino Only" or "Only for guests of the Beautiful Dunes Hotel and Casino" [Tr. 29, 202-204, 347-364].

Overnight patrons were required to pay for their rooms before they could obtain the Dunes Tours [Tr. 29, 217, 233, 260]. Tour patrons were required to sign an official hotel guest register before they were permitted to take the tour flight [Tr. 220-223, 370-371]. Through control of the passengers and their baggage at the Las Vegas Airport and at the Dunes Hotel, Dunes was assured that patrons went to and remained at the Dunes Hotel [Tr. 261-272]. Boarding passes for the return flight from Las Vegas to Los Angeles were issued only in the lobby of the Dunes Hotel [Tr. 267]. Most of the tour benefits were available only at the Dunes Hotel [Tr. 234-235].

The Dunes personnel were carefully instructed to accept only guests of the hotel on the tour flights [Tr. 239-240, 255-256]. The Dunes personnel questioned all callers to ensure that they were not seeking air transportation. The few callers who were seeking air transportation were denied permission to take the Dunes tour [Tr. 218-220, 236-237, 256-261].

A number of public witnesses testified as to their understanding that the tour flights were free and that they were available only to guests of the Dunes Hotel [Tr. 210-215, 249-253, 272-282]. Public witnesses testified that they were denied permission to take the tour flight [Tr. 29, 258-259, 272-276]. Testimony of virtually all of the public witnesses supported petitioners' contention that the flights were available only

to guests of the hotel. Petitioners established that all of the 57 persons who took the flight of January 10, 1960 were guests of the Dunes Hotel [Tr. 374]. Petitioners also established that during the year 1959, approximately 97% of the tour patrons enjoyed the buffet dinner and picked up the bottle of champagne at the Dunes Hotel, which are included in the tour benefits [Tr. 373].

It is apparent that the Dunes Hotel effectively limited patrons of its tours to its hotel guests. The Court should find that the petitioners so limited the tour patrons, and did not engage in air transportation in violation of Section 401(a) of the Federal Aviation Act of 1958, but instead engaged in private air transportation, which is not subject to regulation by the Board.

The Board's Order Is Not Supported by Substantial Evidence Because the Board Relied on Evidence of Violations Not Charged in the Complaint.

The charges against the administrative respondents are contained in the complaint filed by the Bureau of Enforcement [Tr. 2-6]. The complaint asserts violations of "Section 401(a) of the Federal Aviation Act of 1958" (49 U. S. C. Sec. 1371(a)) since April 24, 1958 [Par. 6, Tr. 3; Par. 8, Tr. 4]. This section of the Federal Aviation Act of 1958 did not become effective until January 1, 1959.[10] No other violations were charged in the complaint.

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[10]Public Law 85-726, August 23, 1958, Section 1505. This public law provided that Section 401(a) and other sections of the Federal Aviation Act of 1958, would become effective on the 60th day following the date on which the Administrator of the

Since the charges consisted in their entirety of violations of a statute which did not become effective until January 1, 1959, the Board could not properly receive evidence of activities prior to January 1, 1959, and could not properly consider such evidence in making its findings, conclusions and decisions. In fact, the Board did receive and consider such evidence, and relied heavily on the same in making its findings and conclusions and its decision in this case [Tr. 26-27, 31, 51, 53-54, 80].

The elaborate testimony of the Board investigators [Tr. 121-162] and the numerous exhibits sponsored by them [see, Exs. OCA 5A, 6-10, 12E, 12F, 19-21, 38, 40; Exs. OCB 1, 46, 72, 130-135] all are of events which occurred in 1958. The entire investigation by the Board of the activities of the respondents, took place in 1958. The respondents moved to exclude evidence of activities prior to the effective date of Section 401(a) of the Act [Tr. 117-118, 121-122]. The Examiner denied petitioners' several motions, and extensive evidence of Respondents' activities prior to January 1, 1959 was received in evidence [Tr. 31, 119].

The record in this proceeding would be drastically altered and diminished, if evidence of 1958 activities were excluded. Absent this evidence, the Board's order is not supported by substantial evidence, and this court is required to set it aside. (5 U. S. C. Sec. 1009(e)). In any event, the Board has considered and relied on voluminous evidence which should not have

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Federal Aviation Agency first appointed under this Act, qualified and took office. The first Administrator of the Federal Aviation Agency was appointed, qualified and took office on October 31, 1958. See, note 49 U. S. C. A. Transportation, Section 301 to end, 1961 Cumulative Annual Pocket Part, page 143.

been received in evidence. Since this evidence is so voluminous and extensive,[11] this court should set aside the Board's order or remand the proceeding to the Board with instructions to exclude all evidence of activities and events which occurred in 1958, and render its decision on the basis of the revised record.

The Injunction Against Petitioners Rich and Miller Is Invalid.

The Board has enjoined petitioners, Rich and Miller, ". . . individually, and as principals in Trans-Global Airlines, Inc. . . ." from engaging in air transportation in violation of 49 U. S. C. Section 1371(a). Petitioners, Rich and Miller, were not respondents in their individual capacities at the time the Board Order was entered [Tr. 163].

The purported basis for the inclusion of Rich and Miller in the Board injunction is contained in the Examiner's Initial Decision:

> "In view of the evidence here disclosing Messrs. Miller and Rich as principals in the operating carrier, Trans-Global, and as partners in the C-46 Company which owns two of the aircraft used in the operation, and the likelihood that operations may be resumed under some other name unless these persons are individually enjoined from engaging in air transportation . . ." [Tr. 52].

There is no evidentiary basis for the conclusion that a likelihood exists that operations may be resumed under some other name, unless petitioners Rich and Miller are individually enjoined, to be found within the

[11]Petitioners included only a representative portion of such evidence in their designation of record.

four corners of the record. It appears that the Examiner merely applied the rationale of *F. T. C. v. Standard Education Society*, 302 U. S. 112 (1937) to this case, despite the absence of any evidentiary basis to support this action.

The import of the *Standard Education Society* case, *supra,* is clarified in *P. J. Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535 (C. A. 7, 1951). In the *Standard Education Society* case, officials of the corporation were named individually in the complaint, the corporation was organized by the individuals for the purpose of evading any order which might be issued against the corporation, and the circumstances disclosed in the findings of the administrative agency and the testimony were such that further efforts on the part of the individual respondents to evade the administrative agency's order could be anticipated. The court also noted in the *Standard Education Society* case, *supra* that the individual respondents acted with practically the same freedom as though no corporation had existed (191 F. 2d 539). This is tantamount to a finding that the corporation was the *alter ego* of the individuals.

These crucial elements are absent in the instant case. Petitioners Rich and Miller were not charged in the complaint individually, Trans-Global was not their *alter ego,* they did not organize Trans-Global to avoid Board regulation, and there is no evidence that would support an inference that they would attempt to evade the Board's order issued in this case.

The evidence of record shows that petitioners, Rich and Miller, were the principals of Trans-Global Airlines, Inc., a corporation, and that Trans-Global and

Catalina performed the flight portion of the Dunes Tours [Tr. 26, 55-56, 163], Petitioners, Rich and Miller, as partners doing business as the C-46 Company, leased two of the aircraft which were used in performing the tour flights [Tr. 194-195].

There is no evidence that Trans-Global or its principals, Rich and Miller, played any other role in connection with the Dunes Tours. Although the Examiner found that there is a likelihood that petitioners Rich and Miller will attempt to resume the operations under another name, or otherwise attempt to avoid the Board's orders in the future, he significantly fails to make any finding, or to point to any evidence which supports this conclusion.

The Examiner made the following specific finding:

> "Thus the operation of the flights and advertising of the flights are in Dunes' name, all of the duties and services incident thereto except the physical operation of the aircraft are performed by Dunes, the aircraft used in their operation bear the Dunes markings, and all of the flights are operated under the Dunes complete direction, supervision and control." [Tr. 55-56.]

It follows from this finding that the activities of petitioners Rich and Miller and Trans-Global were merely ministerial. Their activities consisted, respectively of leasing aircraft and operating flights "under the Dunes' complete direction, supervision and control." If this finding is in accordance with the evidence of record, and it unquestionably is, then the Examiner's finding that there is a likelihood that operations will be resumed under another name unless petitioners Rich and Miller are enjoined individually, must fall.

This court's holding in *Las Vegas Hacienda Inc. v. C. A. B.*, 298 F. 2d 430, 440 (1962), has particular application in this proceeding. The court struck down a similar case and desist order against petitioner Price, because there was no substantial evidence that Price participated in the holding out of the tours.

The Board's injunction is directed against petitioners Rich and Miller both "individually and as principals in Trans-Global Airlines Inc." There plianly is no evidence to support the granting of an injunction against petitioners Rich and Miller, individually.[12] We submit that the record contains no proper basis for an injunction against petitioners Rich and Miller as principals in Trans-Global Airlines. Since the record does not support the inclusion of these petitioners in the injunction in either capacity, the Board's order should be modified accordingly.

The Board's Order Is Too Broad and Indefinite.

The Board has enjoined the petitioners from engaging in air transportation in violation of 49 U. S. C. Section 1371(a). This order does nothing more than command petitioners to obey the law, and is too vague, broad and indefinite to constitute notice to petitioners of activities they are forbidden to engage in. No one knows precisely what the technical phrase "engaging in air transportation" means, although it can fairly be said that it comprises virtually all flight activities which are subject to Board regulation. ". . . there should be no judicial approval of an order to cease and desist from we don't know what". Justice Jackson,

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[12]The Board does not contend that petitioners Rich and Miller engaged in "air transportation" individually.

dissenting in *F. T. C. v. Ruberoid Co.,* 343 U. S. 470, 494, (1952).

Petitioners, Rich, Miller and Trans-Global, each of whom engages in extensive aviation activities, other than the operation of the Dunes' flights,[13] may continue these activities, but only in peril of contempt proceedings, if they should stray over the line and enter the undefined area of air transportation. (See 49 U. S. C. Sec. 1487(a)).

This court, while sustaining a similar order in *Las Vegas Hacienda v. C. A. B.,* 298 F. 2d 430 (C. A. 9, 1962), nevertheless criticized the form of the order as undesirable (298 F. 2d 439-440, fn. 35). This court suggested that a decree should be drawn enjoining the acts which constituted violations and perhaps other unalwful acts reasonably related to the violations established (*F. T. C. v. Mandel Bros.,* 359 U. S. 385, 392-393, (1959)), provided the record discloses a proclivity to unlawful activity. *F. T. C. v. Beech-Nut Packing Co.,* 257 U. S. 441, 456 (1922).[14]

The record shows no proclivity to violate and no past violations on the part of any petitioners. Moreover, the facts of the situation here are readily distinguishable from *Las Vegas Hacienda Inc., supra,* and *Consolidated Flower Shipments, Inc. v. C. A. B.,* 213 F. 2d 814, 818 (C. A. 9, 1954), where the order

[13]See Affidavit of petitioner, Donald Rich, in support of Motion for Stay of the Board Order in this proceeding, dated January 31, 1962. The operation of the Dunes Tour flights was discontinued in May, 1961 and have not been resumed.

[14]While the injunction may be expressed in generic terms, it must reasonably identify the prohibited conduct. (*F. T. C. v. Beech-Nut, supra.*)

was directed against persons not engaged generally in the operation of aircraft.[15] While a hotel operator such as Las Vegas Hacienda or the Dunes Hotel can understand that the order directs them to cease operating tour flights[16] the same is not true of the remaining petitioners who engage extensively in various other aviation activities.

The Board's order is not sufficiently particularized by reference to the Board's complaint, investigation and opinion. The Board's complaint is couched in the most general terms. Petitioners know nothing of the Board's investigation, and the Board's opinion simply indicates that the operation of these tour flights constitutes "air transportation" which requires a license under 49 U. S. C. Section 1371(a). Petitioners are left completely in the dark as to any other acts which might constitute future violations of the Board's injunction. As this court recently stated[17] the Board should ". . . frame an order prohibiting the illegal conduct in terms of objective criteria narrower than the statute yet broader than the precise facts of the particular case."

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[15]In the case of Las Vegas Hacienda Inc., aviation activities were limited to the performance of tour flights for hotel patrons.

[16]In the case of Hacienda, aviation activities were limited to the performance of tour flights. The order in the *Consolidated Flower case, supra,* in effect directed the petitioner to submit itself to limited C. A. B. regulation. No such alternative is available to the petitioners.

[17]In *Las Vegas Hacienda Inc. v. C. A. B.,* 298 F. 2d 430, 439-440, fn. 35 C. A. 9, 1962.

Conclusion.

For the foregoing reasons and authorities, the Board's order should be set aside or modified, or this court should order a remand to the Board for further proceedings.

Respectfully submitted,

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